

HOUSE BILL REPORT

ESHB 2016

As Passed House:

March 10, 2007

Title: An act relating to eminent domain.

Brief Description: Changing provisions pertaining to eminent domain.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Springer, Lantz, Wallace, Seaquist, P. Sullivan, Moeller, Lovick, Takko, Kessler, Morrell, Rolfes, Ericks, VanDeWege, Goodman, Simpson, Linville and Ormsby).

Brief History:

Committee Activity:

Judiciary: 2/16/07, 2/27/07 [DPS].

Floor Activity:

Passed House: 3/10/07, 97-0.

Brief Summary of Engrossed Substitute Bill

- Requires a condemnor to consider alternatives to condemnation.
- Changes the limit on the condemnee's recovery of costs incurred in evaluating the condemnor's offer.
- Allows a condemnee to retain a repurchase option to buy back the condemned property if it is to be sold within seven years.
- Prohibits condemnors, with some exceptions, from condemning property for purposes of economic development.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern, Flannigan, Kirby, Moeller, Pedersen, Ross and Williams.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Bill Perry (786-7123).

Background:

Eminent Domain.

Eminent domain is the term used to describe the power of a government to take private property for public use. The power has been recognized by federal and state courts as inherent and necessary for the existence of government. Because it is an inherent power, express constitutional or statutory authority is not necessary to create it. Rather, constitutions and statutes define, restrict, and delegate the power of eminent domain and provide a procedural framework for its exercise. The power of eminent domain extends to all types of property, although it is most often associated with the taking of real property, such as acquiring property to build a highway. A "condemnation" is the judicial proceeding used for the exercise of eminent domain.

The Fifth Amendment to the U.S. Constitution provides simply that:

" . . . private property [shall not] be taken for public use, without just compensation."

Article I, section 16 of the State Constitution is more detailed. It provides, in part:

"Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made . . . which compensation shall be ascertained by a jury . . . Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public . . ." (emphasis added)

Other constitutional provisions grant eminent domain powers to telephone companies, make the property of corporations subject to eminent domain to the same extent as the property of individuals, declare the use of water for irrigation, mining, and manufacturing to be a "public use," and prohibit the exercise of eminent domain in conjunction with non-recourse revenue bond financing of industrial development projects. In addition, there are in excess of 300 statutory sections in the Revised Code of Washington dealing with eminent domain powers. Some of these statutes prescribe the process for bringing condemnation actions, for determining whether a project meets the public use requirement, and for determining what constitutes the "just compensation" that must be paid to the owner of condemned property. Some of these statutes confer eminent domain powers on governmental entities ranging from counties to mosquito control districts, as well as giving the power of eminent domain to corporations such as railroads, electrical utilities, and pipeline companies.

The "Public Use" Requirement under State and Federal Law.

The question of what is a "public use" has been answered differently by federal and state courts in construing the meaning of the respective constitutions. One obvious difference between the two constitutions is that Article I, section 16 explicitly prohibits taking property

"for private use" (with limited exceptions), and the Fifth Amendment has no such explicit prohibition.

The recent U.S. Supreme Court decision in *Kelo v. City of New London* is the Court's latest interpretation of the Fifth Amendment's Taking Clause. The decision has caused a great deal of comment and speculation across the country about the future use of the power of eminent domain for economic development purposes. However, case law in this state indicates that the Washington Supreme Court is unlikely to interpret the State Constitution to allow the broad use of eminent domain recognized by the U.S. Supreme Court in *Kelo*.

In *Kelo*, the city of New London, Connecticut, planned to condemn property as part of an economic development plan. The condemnation of property for the development plan did not come from an area of blight. The plan called for the condemned property to be transferred to a private developer. When completed, much of the property in the development was not to be made available for use by the general public. The plan was intended to enhance the city's tax base and to create jobs, among other things. The Court upheld the plan as meeting the "public use" requirement of the Fifth Amendment.

By contrast, in this state plans involving condemnation for economic development, or plans that allow transfer of property to private parties, have received more scrutiny by the Washington Supreme Court. In *Hogue v. Port of Seattle*, a 1959 decision, the Court declared unconstitutional a plan by a port district to condemn property and transfer it to private parties as part of the creation of an industrial development district. The Court required, as the State Constitution does, that the proponents of such a plan must show that the condemned property is to be put to what is "really" a public use. The Court noted that simply wanting to put someone's property to a better use is not sufficient grounds to condemn it. On the other hand, in *Miller v. City of Tacoma*, a 1963 decision, the court upheld the use of condemnation as part of an urban renewal plan. Apparently, the fact that the property to be taken had been declared "blighted" overcame objections that the use to which the property was to be put was not a public use. In *In re City of Seattle*, a 1973 decision, the Court struck down a plan to acquire property in order to enhance the Westlake retail area of the city. Some of the condemned property was to be transferred to a private developer. The Court concluded that the planned use of the property was predominately private, and therefore violated the public use requirement of Article I, Section 16. Finally, in *State ex rel. Washington State Convention and Trade Center v. Evans*, a 1998 decision, the Court allowed the condemnation of property as part of an expansion of the convention and trade center, even though a portion of the property was transferred to a private party for the construction of a private parking garage. The Court determined that the private use of the property below the fourth floor expansion of the center was merely "incidental" to the public use of the condemned property.

The case law suggests that in Washington, the public use requirement cannot be met by a plan to condemn property simply to put it to a more productive use as part of an economic development project. It also appears that while some transfer of condemned property for private use may be permissible, such a transfer must be only incidental to a public use.

It is not clear how much weight the Court will give to a legislative declaration of "public use." Notwithstanding that Article I, Section 16 requires any question of "public use" to be determined by the courts "without regard to any legislative assertion," the Legislature has frequently made such assertions. For example, the statute dealing with the eminent domain power of counties declares a condemnation to be for the public use "when it is directly or indirectly, approximately or remotely for the general benefit or welfare of the county or of the inhabitants thereof." While the courts do acknowledge, and give some deference to, legislative declarations, ultimately the Constitution explicitly vests authority to decide the question with the courts. It may be, however, that a legislative declaration of what is not a public use would be viewed differently by the courts than a declaration of what is a public use. Presumably, the Legislature may limit government's constitutional eminent domain powers even if it cannot expand them.

Costs in Condemnations.

A number of statutes provide for recovering various costs under particular circumstances in eminent domain proceedings. One of these provisions requires the condemnor to reimburse the condemnee for reasonable fees incurred in evaluating the condemnor's offer of compensation for the property. There is a cap of \$750 on the fees that may be recovered.

Disposition of Condemned Property.

Once property has been acquired through eminent domain, a question may arise as to when, if ever, or for what duration, the property is to be put to the stated use for which it was condemned. A variety of statutes require certain procedures to be followed when a public agency decides to sell property. Most of these statutes are general in nature and apply to the sale of property, however it was acquired. A few, however, apply specifically to condemned property, and at least two statutes require that the prior owner of condemned property be given the opportunity to buy back the property. Property that was acquired through condemnation as part of a port's industrial development district, but is deleted from the district after less than two years, must be offered for sale to the prior owner at the appraised price. The Department of Natural Resources is also required to offer no longer needed condemned land for sale to the former owner at the appraised price.

Summary of Engrossed Substitute Bill:

At least 30 days before a condemnation action goes to trial, the condemnor must provide the condemnee with written documentation showing that the condemnor considered alternatives to condemnation. The documentation must include reasons for rejecting alternatives and must cover at least any reasonable alternative suggested by the condemnee 60 days or more before trial.

The \$750 cap on reimbursable expenses for evaluating a condemnation offer is changed to a maximum amount that is the lesser of 1 percent of the value of the property or \$5,000. The reasonably incurred fees that may be recovered are specified to include the fees of appraisers, attorneys, architects, engineers, or others reasonably retained by the condemnee.

An owner whose property is condemned, or is sold under the threat of condemnation, must be given the opportunity to retain an option to repurchase the property if it is to be sold within seven years of the condemnation. The value of a retained repurchase option is to be deducted from the amount of any condemnation award. If a condemnor decides within seven years of acquiring the property that it is no longer necessary for a public purpose and should be sold, a prior owner with a repurchase option must be notified of the impending sale. The prior owner may repurchase the property for the lesser of the current appraised value of the property, or the compensation price paid at condemnation plus interest accrued at the market rate. Any repurchase price is to be adjusted for the value of any physical changes to the property as determined by an appraiser.

All public and private entities with the power of eminent domain, except port districts and common carriers such as utilities and railroads, are prohibited from condemning property solely for the purpose of economic development. "Economic development" includes acquiring property in order to increase tax revenues or tax bases, employment, or economic health. "Economic development" does not include acquiring property primarily for the purpose of transferring it to:

- public ownership;
- a common carrier or public utility;
- a private entity when necessary to remove a threat to public health or safety;
- a private entity when necessary for the removal of various threats to life, health, safety or property, or for the removal of conditions detrimental to, or constituting a menace to, public health, safety, welfare, and morals;
- a private entity when necessary to acquire abandoned property; and
- a private entity through a lease when the private entity occupies an area within a public project or facility.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) While the state may be safe from an egregious outcome like the *Kelo* decision, there have been some recent cases that show the need for a change in the condemnation laws. Currently, a condemnor may simply refuse to consider any alternative to condemnation. The \$750 cap on fees for evaluating a condemnor's offer is woefully inadequate. The repurchase option provision in the bill is an outgrowth of the Monorail case and has been carefully vetted to avoid the constitutional problem of selling government property at less than fair market value. The bill prevents turning over property to a different private owner just to spur economic development, but doesn't affect government's ability to deal with blight.

(With concerns) The requirement for considering alternatives to condemnation doesn't set a high enough standard and doesn't provide penalties for noncompliance. The bill should include a provision to limit what a railroad company can charge a landowner to reacquire an easement over land the company condemned from the owner. Courts have defined just compensation as fair market value, but there is no willing seller in the case of condemnation. There should be a 30 percent bonus above the court-determined compensation. The bill may deter the functions of some private corporations. All private entities should be exempted. There should be no cap on reasonable expenses incurred in evaluating an offer of just compensation.

(Opposed) A *Kelo*-like decision could not happen in Washington. The bill goes too far. The Legislature expects quick completion of projects, but having to consider all alternatives after condemnation has begun will slow things down. The requirement for considering alternatives applies way too late in the process. Some of the bill's provisions are unnecessary because many condemnations are done under federal law.

Persons Testifying: (In support) Representative Springer, prime sponsor; Eric Johnson, Washington Public Ports Authority; and Kaleen Cottingham, Futurewise.

(With concerns) Greg Wright, Washington Realtors; Gerald Steel; Mary Lou Powers, Citizens Health Advisory Group; Ralph Gorin; Chris McCabe, Association of Washington Business; Steve DiJulio, Association of Washington Cities; Gerry Gallinger, Washington State Department of Transportation; Deanna Willingham, Snohomish County; and Tom Peterson, Washington Land Title Association.

(Opposed) Gary Ekstedt, Yakima County.

Persons Signed In To Testify But Not Testifying: None.